

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 15 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

FRANK MANUEL BRACAMONTE,

Appellant.

2 CA-CR 2005-0275
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040254

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Jack L. Lansdale, Jr.

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Frank Manuel Bracamonte was charged by indictment with fleeing from a law enforcement vehicle, theft of a means of transportation by control and/or by controlling stolen property, third-degree burglary, possession of burglary tools, and possession of a deadly weapon by a prohibited possessor. The weapons misconduct charge was severed, and after a jury trial, he was convicted of the first two counts. Bracamonte admitted he had two prior felony convictions, and the trial court sentenced him to

concurrent, mitigated prison terms of four and ten years. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), avowing he “has found no arguable issues on appeal, save those which counsel believes to be harmless error.” Bracamonte has filed a supplemental brief.

¶2 Bracamonte first argues the jury selection process resulted in a violation of his constitutional right to be tried “by an impartial jury representing a random cross-section of the entire county of Pima.” He suggests the panel was picked from a group of prospective jurors, all of whom “were from within the immediate Tucson City area.” He asserts that through the county’s jury selection process, only persons living “within relatively close proximity to the Courthouse” are selected in order to minimize the cost of paying jurors mileage.

¶3 First, it appears from the record before us that this argument is being made for the first time on appeal. Relying on *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998), Bracamonte insists the error is structural and “not subject to the Harmless Error doctrine or analysis.” We disagree because we see no error at all, much less error that can be characterized as structural. Moreover, because it appears Bracamonte did not raise this issue below, our review is limited, in any event, to one for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We see neither.

¶4 As Division One of this court stated in *State v. Wooten*, 193 Ariz. 357, ¶ 21, 972 P.2d 993, 998 (App. 1998):

The selection of a jury from a representative cross-section of the community is an essential component of a

criminal defendant's Sixth Amendment right to an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). "In order to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

Bracamonte has not established the Pima County Jury Commissioner has adopted a policy intended to exclude persons living in parts of the county outside the City of Tucson and its closely surrounding areas.

¶5 Second, like the defendant in *Wooten*, Bracamonte has "failed to establish that a cognizable group was excluded" for purposes of equal protection, due process, or any other guarantees under the state or federal constitutions. *Wooten*, 193 Ariz. 357, ¶ 23, 972 P.2d at 998; *see also State v. Atwood*, 171 Ariz. 576, 639-40, 832 P.2d 593, 622-23 (1992) (rejecting defendant's fair cross-section claim that persons not employed by larger corporations, which compensated employees for jury duty, were excluded from jury pool; finding defendant had failed to identify a distinctive group), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Jordan*, 171 Ariz. 62, 66, 828 P.2d 786, 790 (App. 1992) (defining cognizable racial group). Finally, here, as in *Atwood*, nothing in the record establishes the jury that was selected "fell short of the requisite standards of fairness and impartiality." *Atwood*, 171 Ariz. at 641, 832 P.2d at 624.

¶6 Bracamonte next challenges the jury instruction on reasonable doubt that the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), claiming, *inter alia*, it “violated his due process rights to a fair trial under the U.S. Constitution.” Since it decided *Portillo*, the supreme court has reaffirmed the propriety of the instruction, rejecting challenges to its constitutionality. See *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We have no authority to overrule the supreme court. *State v. Hoover*, 195 Ariz. 186, ¶ 14, 986 P.2d 219, 221-22 (App. 1998).

¶7 We have reviewed the entire record before us for fundamental, prejudicial error in accordance with *Anders*. See *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (to be reversible, fundamental error must be prejudicial as well). We have found none; therefore, we affirm the convictions and the sentences imposed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge